

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KEVIN Q.,

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH CASE NO. L 2006100681

DECISION

Donald P. Cole, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on November 20, 2006, in San Bernardino, California.¹

Enriqueta V. represented claimant, who was not present at the fair hearing.

Deborah K. Crudup, Program Manager, Inland Regional Center, represented the service agency.

The matter was submitted on November 20, 2006.

ISSUE

Should the service agency fund parental vouchered respite care services, as opposed to agency funded respite services, for claimant's family?

FACTUAL FINDINGS

Jurisdictional Matters

1. Claimant Kevin Q was born on September 6, 1991. Claimant has a "developmental disability" involving mild mental retardation, and is eligible for regional

¹ With the parties' agreement, and because the sole issue in the two proceedings was the same, a joint fair hearing was held for claimant and his sister. A separate Decision is issued this date for his sister.

center “services and supports for persons with developmental disabilities” under Welfare and Institutions Code section 4712.² Services and supports are provided through the Inland Regional Center (IRC), the family’s service agency.

2. On October 6, 2006, a fair hearing request was made on claimant’s behalf. The request asserted that IRC should “continue” to fund parental respite services for Kevin.

Respite Care Methods of Delivery

3. Respite care is defined in Welfare and Institutions Code section 4418.6 as “temporary and intermittent care provided for short periods of time.” Until late 2004 or early 2005 (the precise date varying from family to family), respite care services were provided to families of developmentally disabled persons through a “parental voucher” delivery system. Under this system, parents selected, hired and compensated respite care providers directly. As employers, the parents were responsible for all documentation, recordkeeping, and other procedures incident to their employer status.

4. Effective August 27, 2004, the Office of Administrative Law approved a change in California’s regulations applicable to respite care. The change was made in response to a new federal policy, under which federal reimbursement to the states for one-half the cost of respite care for developmentally-disabled children was authorized. In order to qualify for federal reimbursement, regional centers had to follow new, more stringent recordkeeping requirements. Further, the federal government intended to monitor compliance with these recordkeeping requirements more closely than in the past. If a respite provider was found to be out of compliance with the new requirements, both the regional center and the California Department of Developmental Services (DDS) risked non-reimbursement for the respite services in question and the possible denial of all further federal respite care funding.

Accordingly, IRC gradually discontinued the parental voucher system and implemented a “respite agency” system in its place. Under the new system, parents had to choose a respite care agency (or “vendor”) through which respite services would be provided. Parents had two options in this regard. First, they could simply have the agency send out one of its own respite care employees; this delivery method is known as “routine respite.” Second, the parents could themselves select an individual, a “preferred care provider.” In the latter case, the selected individual would submit an employment application to the respite agency, which would in turn hire and compensate the individual in question. The second option was a mechanism by which parents could, if they wished, retain the respite care provider whom they had employed under the parental voucher system. In that case, however, the respite care agency, and not the claimant’s parents, acted as the employer and was thus responsible for carrying out all responsibilities incident to that status, including the new strict recordkeeping requirements.

² All statutory references in this Decision are to the Welfare and Institutions Code, unless otherwise noted.

In late 2004, IRC began to transition its 4,500 clients who were receiving respite care services from a parental voucher method to either routine or preferred provider respite. The transition was accomplished gradually over a twelve to fifteen-month period so that there would be no interruption of services for any family. Each family continued to receive parental vouchered respite until the transition of that family to agency respite was completed.

The purposes of permitting parents to transition from parental vouchered to agency respite were: (1) to ensure that IRC's vendors complied with state and federal regulatory recordkeeping requirements; and (2) to permit families to keep their parental vouchered respite care provider under the new system, if they wished to do so.

5. The overwhelming majority of the 4,500 families who received respite care services through IRC agreed to the transition to agency respite. About a dozen families who wished to retain parental vouchered respite went to fair hearing on the issue. As of the date of the hearing in this matter, only four families were receiving parental vouchered respite. In each of those four cases, the families furnished the required records to IRC and demonstrated a consistent ability to comply with all recordkeeping requirements.

Chronological Summary

6. Before October 2004, Kevin received Lanterman Act services and supports from the San Gabriel Pomona Regional Center (SGPRC), including parental vouchered respite care. In June 2004, Administrative Law Judge Samuel D. Reyes issued a fair hearing decision upholding SGPRC's discontinuance of respite care services for Kevin.

7. In October 2004, after Kevin and his family moved into IRC's service catchment area, IRC became Kevin's service agency. Pending the development of a new individualized program plan for Kevin, IRC initially provided Kevin with the services he had been receiving from SGPRC. Because Kevin's respite care services were terminated by SGPRC some months before his transition to IRC, respite care was not among the services IRC initially provided to Kevin.³

8. Effective March 2005, IRC authorized preferred provider respite for Kevin through In-Roads Creative, Inc., a respite services agency. Despite this authorization, Kevin's mother Enriqueta initially chose not to accept agency respite services. Later, however, for the months of July and August 2005, she agreed to such services.

³ This Factual Finding is based on the testimony of IRC witnesses and documents received in evidence at the hearing. Enriqueta testified that when she received her first visit from an IRC service coordinator, in October 2004, she was asked to sign a form that she later learned caused the family's respite care to be changed from parental vouchered to preferred provider respite. She claimed that when she learned of this change in April 2006, she was told that it was now too late to remain within the parental voucher system. Enriqueta did not read the form when she signed it; she did not keep a copy, nor was one offered as evidence. Enriqueta's testimony was inconsistent with letters IRC subsequently sent to her (see below), in which she was given an opportunity to provide the required documentation so that she could remain in the parental vouchered respite program.

9. In November 2005, Enriqueta requested a fair hearing in which she asked that respite care services for Kevin be funded through the parental voucher method. While the hearing request was pending, an IRC representative worked with Enriqueta, as he had with other families, in an effort to determine whether Enriqueta could comply with federal and state recordkeeping requirements. Enriqueta submitted a packet of documents to IRC in connection with this effort to achieve parentally vouchered status.

10. By letter dated April 4, 2006, IRC advised Enriqueta that the documentation she had submitted did not comply with state regulations in that: (a) with regard to the financial records she submitted, “all portions of the requirements were missing” for the time periods January 2003 through April 2004 and September 2005 through December 2005, i.e., “the [financial] ledger was incomplete and missing 20 months of information;” (b) with regard to the service records she submitted, “there are no records/time sheets” for the time periods January 2003 through April 2004 and July 2005 through December 2005, i.e., “the service record is not complete for the aforementioned 22 month period;” (c) the records lacked signed monthly cash receipts; and (d) there was no submission of proof of worker’s compensation insurance.

The documents received in evidence confirmed these inadequacies.⁴

11. IRC then gave Enriqueta an opportunity to make a second submission of records to remedy the inadequacies of her first submission. Enriqueta did in fact make a second submission.

12. By letter dated July 18, 2006, IRC advised Enriqueta that the documentation she had provided in connection with her second submission remained out of compliance with state regulations in that: (a) with regard to the financial ledger she submitted, “all portions of the requirements were missing” for the time period September 2005 through December 2005; (b) with regard to the service records she submitted, “there are no records/time sheets” for the period July 2005 through December 2005; (c) the records lacked any signed monthly cash receipts; and (d) there was no submission of proof of worker’s compensation insurance.

The documents received in evidence at the hearing confirmed these inadequacies.

⁴ IRC’s exhibits included, under the tab “first respite record review,” service records (i.e., time sheets) for January 2003 through December 2003. This would seem to imply that Enriqueta had provided those time sheets prior to IRC’s April 4, 2006 letter. However, these documents each bore Enriqueta’s signature dated May or June 2006. Accordingly, they were submitted after April 2006 and were mistakenly placed under the first record review tab. While in contrast, Enriqueta’s *financial* records (a financial ledger) included under IRC’s first review tab were dated *contemporaneously* for each of the months from January 2003 through July 2004, an IRC checklist reflected as missing all financial information for the months from January 2003 through April 2004. Further, the financial ledger abruptly stopped in the middle of the page after the July 2004 entry, and recommenced on a new sheet for August 2004 and following. Based on all of these considerations, Enriqueta’s ledger for January 2003 through July 2004 was not submitted to IRC until after the April 4, 2006 letter; like Enriqueta’s time sheets, the ledger for this early period was inadvertently placed under IRC’s first record review tab when IRC’s records were compiled for submission at the fair hearing.

13. Based on its conclusion that the records Enriqueta did not comply with state regulations, IRC advised her that it “must terminate the parental voucher, as your vendor records are not in compliance with regulations.”⁵ Enriqueta was advised that transition to preferred or routine respite services were options still available to her.

14. On July 24, 2006, a fair hearing was scheduled to be held with regard to Enriqueta’s request for parental vouchered respite services. Enriqueta did not appear at the hearing. In an order issued several days later, Administrative Law Judge Vallera Johnson dismissed the fair hearing request without prejudice.

15. On August 16, 2006, during a quarterly home visit, Enriqueta renewed her request that IRC fund parental respite services. Kevin’s service coordinator informed Enriqueta that parental respite services were no longer funded by IRC, but that respite services were available through an agency.

16. By letter dated September 6, 2006, IRC formally denied Enriqueta’s request for parental vouchered respite services. The letter stated that “parental respite is no longer available as one of the services funded by IRC and you can be referred to receive respite services through an agency.” The letter added that IRC “will continue to offer you preferred provider respite or route respite services through an agency. A referral for respite services can be made to another agency of your choice.”

17. On October 6, 2006, Enriqueta filed a fair hearing request on Kevin’s behalf.

Kevin’s Claimed Need for Parental Vouchered Respite

18. Enriqueta testified that she did not believe preferred provider respite care meets her family’s needs because of difficulties she had experienced in a previous effort to implement preferred provider respite.⁶ More specifically, her previous provider was unable to schedule necessary appointments with In-Roads and quit after several months because In-Roads had not paid her. According to Enriqueta, her provider also had problems with Karen, an In-Roads employee. Enriqueta testified in vague terms regarding a meeting that took place at In-Roads’ facility and in which an IRC representative was involved. As a result of this meeting, Kevin’s provider was paid the back wages she was owed, albeit six months after the services were rendered. The provider then resigned.

The record does not reflect any other requests on Enriqueta’s part for IRC’s assistance to help resolve any difficulties involving In-Roads as a service agency.

Enriqueta’s preferred care provider did not testify.

⁵ This phraseology is curious, in that Kevin’s parental vouchered respite services had already been terminated, by SGPRC, before Kevin became an IRC consumer.

⁶ Enriqueta also testified that she would not feel comfortable having a stranger as a respite care provider in her home.

An IRC representative testified that IRC remained ready and willing to assist Enriqueta to obtain preferred provider respite for Kevin. No evidence was adduced at the hearing that called the sincerity of IRC's representation into question.

19. Enriqueta testified that she did not presently have anyone ready to provide parental vouchered respite services for Kevin, nor had she had anyone lined up within the past six months prior to the date of the hearing. She testified that she had several people in mind that she planned to talk to about their possible availability and interest in providing respite services to Kevin.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. "The moving party — that is, the party asserting the claim or making the charges — generally has the burden of proof" in administrative proceedings. (Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.50, p. 365.) No published decision has been found that addresses the applicability of this general principle to Lanterman Act fair hearing proceedings. It is concluded by analogy, however, that the party in such proceedings who seeks to change the status quo has the burden of proof. In the present proceeding, it is the claimant who seeks to change the level of services, since parental vouchered respite care was not a funded service for Kevin at the time of the fair hearing request. Accordingly, claimant has the burden of proof.⁷

In the absence of any statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.) "The phrase 'preponderance of evidence' is usually defined in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.' (BAJI (8th ed.), No. 2.60.)" (1 Witkin, Evidence, *Burden of Proof and Presumptions* § 35 (4th ed 2000).)

Statutory and Regulatory Authority

2. "The Legislature has enacted a comprehensive statutory scheme known as the Lanterman Developmental Disabilities Services Act . . . to provide a 'pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.' (§ 4501.) Such services include locating persons with developmental disabilities (§ 4641); assessing their needs (§§ 4642-4643); and, on an individual basis, selecting and providing services to

⁷ See also Evidence Code section 500, which provides that "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." In this proceeding, it is the consumer who has made the claim for relief.

meet such needs (§§ 4646-4647). The purpose of the statutory scheme is twofold: to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community (§§ 4501, 4509, 4685), and to enable them to approximate the pattern of everyday living of nondisabled persons of the same age and to lead more independent and productive lives in the community (§§ 4501, 4750-4751).

* * *

In the Lanterman Act '[the] State of California accepts a responsibility for its developmentally disabled citizens and an obligation to them which it must discharge.' (§ 4501.) In so doing, the Legislature has not only recognized that '[persons] with developmental disabilities have the same legal rights and responsibilities [as those] guaranteed all other individuals by the Federal Constitution and laws and the Constitution and laws of the State of California' (§ 4502), but has also granted them certain statutory rights, including the right to treatment and habilitation services at state expense. (See §§ 4502, 4620, 4646-4648.)

To implement this scheme of statutory rights of developmentally disabled persons and the corresponding obligations of the state toward them, the Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, 'has jurisdiction over the execution of the law relating to the care, custody and treatment of developmentally disabled persons' (§ 4416), while 'regional centers,' operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with 'access to the facilities and services best suited to them throughout their lifetime' (§ 4620)." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388-390.)

3. Welfare and Institutions Code section 4646 provides in pertinent part:

“(a) It is the intent of the Legislature to ensure that the individual program plan and provision of services and supports by the regional center system is centered on the individual and the family of the individual with developmental disabilities and takes into account the needs and preferences of the individual and the family, where appropriate, as well as promoting community integration, independent, productive, and normal lives, and stable and healthy environments. It is the further intent of the Legislature to ensure that the provision of services to consumers and their families be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources.”

4. Welfare and Institutions Code section 4648 provides in pertinent part:

“(a) (1) It is the intent of the Legislature that services and supports assist individuals with developmental disabilities in achieving the greatest self-sufficiency possible and in exercising personal choices. The regional center shall secure services and supports that meet the needs of the consumer, as determined in the consumer's

individual program plan, and within the context of the individual program plan, the planning team shall give highest preference to those services and supports which would allow minors with developmental disabilities to live with their families, adult persons with developmental disabilities to live as independently as possible in the community, and that allow all consumers to interact with persons without disabilities in positive, meaningful ways.”

5. Welfare and Institutions Code section 4685 provides in pertinent part:

“(c) In order to provide opportunities for children to live with their families, the following procedures shall be adopted:

(1) The department and regional centers shall give a very high priority to the development and expansion of services and supports designed to assist families that are caring for their children at home, when that is the preferred objective in the individual program plan. This assistance may include, but is not limited to . . . respite for parents

(3) To ensure that these services and supports are provided in the most cost-effective and beneficial manner, regional centers may utilize innovative service-delivery mechanisms, including, but not limited to, vouchers”

6. California Code of Regulations, title 17, section 50604 provides⁸ in pertinent part:

“(a) Service providers shall maintain financial records which consistently use a single method of accounting. These financial records shall clearly reflect the nature and amounts of all costs and all income. All transactions for each month shall be entered into the financial records within 30 days after the end of that month.

* * *

(d) All service providers shall maintain complete service records to support all billing/invoicing for each regional center consumer in the program. Service records used to support service providers' billing/invoicing shall include, but not be limited to:

(1) Information identifying each regional center consumer including the Unique Consumer Identifier and consumer name;

(2) Documentation for each consumer reflecting the dates for program entrance and exit, if applicable, as authorized by a regional center.

⁸ The portions of the title 17 regulations applicable pursuant to the August 27, 2004 amendments are underlined.

(3) A record of services provided to each consumer. The record shall include:

* * *

(D) For all other services, the date, the start and end times of service provided to the consumer, street address where service was provided, and daily or hourly units of service provided.

(E) For goods and/or services purchased utilizing a voucher, in addition to the information specified above, the name of the actual provider of the goods and/or services. For services provided by an individual selected by the consumer or family member, the date of birth, social security number (or a copy of any document accepted by the federal government which establishes identity and employment eligibility which has been compared to the original by the vendored family member and declared under penalty of perjury to be a true and correct copy), address, and telephone number of the individual who actually provided the service must also be maintained.

* * *

(e) All service providers' records shall be supported by source documentation.”

7. California Code of Regulations, title 17, section 50605 provides in pertinent part:

“(a) All service providers’ financial and service records, including source documentation, shall be retained for a minimum of five⁹ years from the date of final payment for the State fiscal year in which services were rendered.”

8. California Code of Regulations, title 17, section 54355 provides in pertinent part:

“(a) A regional center may offer vouchers to family members or adult consumers to allow the families and consumers to procure their own diaper/nutritional supplements, day care, nursing, respite, and/or transportation services. . . .

(b) The regional center shall provide prospective voucher recipients with information to assist them in determining liabilities they may incur by participating in a voucher program. Information provided shall include, but need not be limited to:

(1) Identification of the following areas of potential impact:

⁹ Prior to August 27, 2004, retention was required for a minimum of three years.

* * *

(B) Voucher recipient's status as an employer and employer responsibilities;

* * *

(E) Voucher recipient's responsibility for worker's compensation; and

(F) Voucher recipient's responsibility to withhold and pay the appropriate Federal, State and local taxes."

Analysis

9. The foregoing authority may be summarized in the context of the present proceeding as follows:

(a) The twofold purpose of the Lanterman Act is to prevent or minimize the dislocation of developmentally disabled persons from family and community, and to enable them to approximate the pattern of everyday living of nondisabled persons and to lead more independent and productive lives in the community. (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d at 388-390.)

(b) Each person with a developmental disability has a statutory right to treatment and rehabilitation services. (*Association for Retarded Citizens v. Department of Developmental Services, supra*, 38 Cal.3d at 389; §§ 4502, 4620, 4646, 4648; Cal. Code Regs., tit. 17, § 50510.)

(c) The "services" to be provided to developmentally disabled persons include respite care. (§ 4685, subd. (c)(1).)

(d) Regional centers *may* but, unless necessary to meet the needs of a disabled person, are not required to provide services through the issuance of vouchers. (§§ 4646, subd. (a), 4648, subd. (a)(1), and 4685, subd. (c)(3); Cal. Code Regs., tit. 17, § 54355, subd. (a).)

(e) Service providers shall maintain: (i) financial records which clearly reflect the nature and amounts of all costs and all income; (ii) complete service records to support all billing/invoicing for each regional center consumer, including the date, the start and end times of service provided, street address where service was provided, and daily or hourly units of service provided; and (iii) source documentation. All financial and service records, including source documentation, must be retained for at least three years. Voucher recipients are additionally required to maintain worker's compensation insurance for their employees. (Cal. Code Regs., tit. 17, §§ 50604, subds. (a), (d), and (e), 50605, subd. (a), and 54355, subd. (b)(1)(E).)

10. Based on the applicable burden of proof, it is concluded that IRC should not be required to fund parental vouchered respite care for Kevin. The need for parental voucher respite was not demonstrated. Preferred provider respite was funded for a two-month period. Despite any difficulties that previously existed, IRC is willing and able to assist Enriqueta to secure preferred provider respite. With such assistance, and with a different respite agency and/or a different preferred provider, there is no reason to believe that preferred provider respite cannot work smoothly and successfully in the future. Further, IRC afforded Enriqueta two opportunities to provide necessary documentation to satisfy state regulatory requirements that would apply if Kevin were to receive services through parental vouchered respite. Based on Enriqueta's inability to satisfy those requirements, IRC correctly concluded that she would not be able to comply with the regulations. To require IRC to fund parental vouchered respite in this case would place IRC at risk of the loss of federal funding for Kevin's respite care, as well as the potential loss of federal funding for respite services for all IRC consumers.

11. By reason of Factual Findings 1 through 19 and Legal Conclusions 1 through 10, it is concluded that the service agency should not be required to fund parental vouchered respite services, as opposed to agency respite services, for claimant's family.

Accordingly, there is hereby issued the following:

ORDER

1. Claimant's appeal regarding the service agency's asserted obligation to fund parental vouchered respite care is denied.

IT IS SO ORDERED.

NOTICE

This is the final administrative decision in this matter. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within ninety (90) days.

DATED: _____

DONALD P. COLE
Administrative Law Judge
Office of Administrative Hearings